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THE PREAMBLE AND DECLARATION OF RIGHTS OF THE PENNSYLVANIA CONSTITUTION.

THE PREAMBLE

The constitution of 1776 was adopted not as were its successors directly by the people of the state, but by a convention. The members of this convention, after reciting the decision of the people to separate from the British Empire declare that "We, the representatives of the freemen of Pennsylvania, in general convention met, for the express purpose of framing such a government, confessing the goodness of the great governor of the universe (who alone knows to what degree of earthly happiness mankind may attain by perfecting the arts of government,) in permitting the people of the state by common consent, and without violence, deliberately to form for themselves such just rules as they shall think best, for governing their future society * * * * do, by virtue of the authority vested in us by our constituents, ordain, declare and establish the following declaration of rights and frame of government, to be the Constitution of this Commonwealth, and to remain in force therein forever, unaltered, except in such articles as shall hereafter on experience, be found to require improvement and which shall, by the authority of the people, fairly delegated as this frame of government directs, be amended or improved for the more effectual obtaining and securing the great end and design of all governments herein before mentioned."

In 1790 the Revolutionary War was over. The confederation which had been formed had been superseded by the adoption of the Constitution of the United States. That instrument was preceded by a so-called preamble, in which the act of ordaining the constitution is declared to be the act of the people of the United States and their purposes in so doing are stated. When then, in that year, the people of Pennsylvania created a new constitution for themselves, they introduced it by the words "We, the people of the Commonwealth of Pennsylvania, ordain and establish this constitution for their government," words evidently suggested by the preamble to the federal constitution. No reference to the Deity is made in either.

In 1838 another constitution was enacted, the introduction to which is " We, the people of the Commonwealth of Pennsylvania, ordain and establish this constitution for its (not as in the preceding constitution, 'for their') government." This, again, expresses a purely secular act, in a secular spirit.

In 1873, the present constitution was adopted and the introductory words, for the first time styled preamble, are " We, the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution." For the first time since 1776, do the people, in adopting the Constitution profess to advert to God, and to bear towards Him any particular attitude. In so doing, they break with the policy of the great men who framed the instrument of 1787 and who deemed a government a purely secular contrivance whose function was totally disconnected from the emotions and practices of religion. Their preamble expresses gratitude for only one thing, " liberty." There must be many other things for which gratitude would be equally appropriate and obligatory, and equally agreeable to the Almighty. Since in ordaining the constitution, the people were doing a sovereign act, civil and religious liberty could be simply the result of their own abstinence from trenching too much on the spontaneity of individuals. If the people meant to thank God for the absence within the state of a foreign power which limited liberty, this harking back to the expulsion of the British power, nearly a hundred years after its accomplishments, is remarkable. Had gratitude for it been in abeyance? Had it been perceived that the ex-

pression of corporate gratitude should no longer be omitted?

The Commission appointed to revise the Constitution proposes to allow the preamble to remain, as it was written in 1873. We are to continue to be grateful because we, the sovereign people, who alone can interfere with liberty, do not interfere with it; or because the Federal Government, that operates also in the state, does not interfere with it.

RELATION TO RELIGION

The declaration of rights, it seems, is to continue unchanged, as it was in 1790, and has remained in the constitution of 1838, and 1873, save in one respect, "We find" says the Commission "no necessity for any changes in the bill of rights."

The legislature of 1872, in the Act of April 11th of that year, providing for the calling of a convention to amend the Constitution, stipulated "That nothing herein contained shall authorize the said convention to change the language, or to alter in any manner the several provisions of the 9th article, commonly known as the declaration of rights, but the same shall be excepted from the powers given to said convention, and shall be and remain inviolate forever." Why the declaration of rights contained in the constitution of 1776, which continued in force until 1790 should have been allowed to be superseded by that of 1790, does not appear. If sanctity could attach to such a composition it would seem that the declaration made shortly after the beginning of the Revolutionary War, and which lasted for 14 years, and bore the signature of Benjamin Franklin should possess it, rather than one composed in 1790, at a time of profound peace.

In declining to make any changes in the declaration of 1790, the Commissioners state "To-day, as throughout our history as a state (they should have said, except the first 14 transcendently interesting and momentous years) it expresses the fundamental principles upon which rest the rights of the citizen to the protection of his person and property. Study and reflection convince us that no alteration should be made either in substance or in form, and therefore Article I of the constitution as prepared is identical with Article I of the present Constitution."

The object of a bill of rights is to designate classes of possible interferences by the government of the state with

the actions of individuals, which it, the state will direct its government to abstain from in favor of the independence of the individuals. Let us see how the freedom with respect to religion is treated in the federal constitution. "No law is to be made by Congress respecting an establishment of religion or prohibiting the free exercise thereof." Amendments Art. I Art. III say "No religious test shall ever be required as a qualification to any office or public trust under the United States." The Constitution of Pennsylvania of 1790 adopted two years later, and all the succeeding constitutions say, "That no person who acknowledges the being of a God and a future state of rewards and punishments, shall on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth." To be exempt from risk of disqualification for office holding, one must believe both in the being of a God, and in a future state of rewards and punishments. The constitution is far less liberal in this matter than the sentiment of the people for a century has been, and it is to be regretted that no effort is to be made to harmonize the doctrine with the practice.

The Constitution of 1776 indicates a conception of religious freedom similar to that expressed in the constitution of 1790. It declared that all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding. And that no man ought or of right can be compelled to attend any religious worship or erect or support any place of worship, or maintain any ministry contrary to or against his own free will and consent. Nor can any man who acknowledges the being of a God be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiment or peculiar mode of religious worship. And that no authority can or ought to be vested in or assumed by any power whatever that shall in any case interfere with, or in any manner control the right of conscience in the free exercise of religious worship. The acknowledger of a God may not be deprived of any civil right. The implication is that one who does not acknowledge the being of a God may be justly deprived of some civil rights as a citizen because of his opinions or mode of religious worship. The opinions of this age are widely different, in this respect, from that of the year 1790, but, the declaration of rights, to be adopted in 1922 or later, is, if the rec-

ommendation of the Commission is ratified a reversion to the conception of 130 years ago.

An illustration of the limitations on religious liberty conceived permissible in 1776, is found in the constitution of that year. The legislative power was vested in a single chamber, whose members, before taking their seats were required to make the following declaration, viz:

"I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration."

The statement is then added "And no further or other religious test shall ever hereafter be required of any civil officer or magistrate in this state."

Accordingly, under that constitution, all persons who did not believe in the inspiration of the New Testament, e. g. Jews, Rationalists, might be excluded from any office. There is nothing in the declaration of rights of 1790, and later periods to the present, that clearly forbids this effect.

The 3rd section of the Pennsylvania declaration of rights is "(1) That All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; (2) that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; (3) that no human authority can in any case whatever, control or interfere with the right of conscience, and that no preference shall ever be given, by law, to any religious establishments or modes of worship."

As to the part marked 1, of this section, it may be noted that it secures the man who worships God in any mode, from molestation, but it offers no protection to the man who does not worship or profess to worship, God. If he has a conscience, and it dictates a mode of worship, he has an indefeasible right, that is, a right which shall not be interfered with by the state, or by its authority, to worship in that mode, but to the non-worshipper no protection is extended. In this respect the section fails to express the living purpose of the people of the state, and, instead of being useful, is possibly pernicious. It would shock public sentiment to impose disabilities of any sort on men because they were irreligious.

Part 2 forbids compelling men, to attend any church or erect or support any church, or to maintain any ministry against his consent. Compelled against his consent is a form of thought which even its antiquity can scarcely sanction.

Part 3 negatives any human authority's controlling or interfering with the rights of conscience. But, is there a right of conscience to be heretical; to be atheistic; to refuse altogether to worship anything? There may be not merely a "right of conscience" but a right having no relation to conscience. Is the state to recognize no right of Godlessness, of blank irreligion? "No preference shall ever be given by law to any religious establishments or modes of worship," but may a mode of worship be preferred to no mode of worship? May religion be preferred to irreligion? The Constitution of the United States forbids any law respecting an establishment of religion, and, in so doing, seems to extend a broader franchise than does that of this state. Under that constitution it would not have been possible partially to establish Christianity by forbidding, as does the act of April 22d, 1794, the doing of secular work on the "Lord's Day, commonly called Sunday" the intention of which is to compel the observance of one of the institutions of the prevalent religions, by secular penalties. We cannot but believe that the declaration of right could have been made better to accord with the vastly preponderant sentiment of the people who are going to establish a new constitution for Pennsylvania.

THE POLICAL PHILOSOPHY OF THE DECLARATION OF RIGHTS.

The makers of the constitution of 1790 and of all succeeding constitutions of Pennsylvania have announced the same declaration of rights. The purpose of doing so, they say, is that the general, great and essential principles of liberty and free government may be recognized and unalterably established. "A principle may have three qualities, it seems. It may be general, it may be great, and it may be essential. Would not any one of these words have been enough to express the composer's thought? In what respect is a principle great, if not general; if not essential?

The first of these general, great and essential principles is that "all men are born equally free and independent" and have certain inherent and indefeasible rights. The

Declaration of Independence considered men at their creation, and found them to be then equal. "We hold these truths to be self-evident; that all men are created equal." The framers of the State constitution look at men at their birth, and make an astonishing discovery. They "declare" that men are, not equal, but "equally free and independent." To affirm freedom and independence of the new-born human child—the very image of dependence—is indeed a bold and startling figure of speech. How are the properties of things to be discovered except by observation; and whether, at birth two human beings are free and equally free, independent and equally independent can be known only by looking at them and watching them. Whether they ought to be free and equally free, may, for the apriorist be the subject of a "principle," a great, general and essential principle. But the enouncers of this principle did not seriously entertain it, and many decades had to elapse before the people of Pennsylvania believed in the equal freedom and independence of blacks and whites, whether at birth or afterwards.

"All men" have certain inherent and indefeasible rights. The rights are, Indefeasible," the enumerated rights are not. They can be extinguished by crime. They can be ignored by the state, when it enters into war and compels men to sacrifice liberty, and the pursuit of their own happiness, for ends which sometimes they do not desire to have realized. It is of dubious benefit to the people, to concede to them, for rhetorical objects, what must be taken from them, in the actual evolution of government.

THE DEPOSITARY OF POLITICAL POWER

The 2d section of the Declaration announces that "All power is inherent in the people." All power means probably all political power, all power to impose prohibitions and commands upon human beings. But who are "the people" in whom this power inheres? All or some? Not all, for minors, until recently, women, for a considerable time negroes, foreign sojourners, sometimes men without a described minimum of intelligence, have no political power. They are a subject class. So, this great and essential and general principle, when interpreted by the conduct of the state, means, "All political power is inherent in those of the people, in whom, with the consent of the state, it does

inhere," a principle as luminous and beneficent as it is "general, great and essential."

POWER TO CHANGE THE CONSTITUTION

For the advancement of their peace, safety and happiness the people "have at all times an unalienable and indefeasible right to alter, reform or abolish their government, in such manner as they may think proper." The reader of these imposing words would hardly suspect that the constitution to which they are prefixed, does not allow a change of the government, except with the consent of the existing government. Art. XVIII of the constitution of 1873, requires two legislatures to agree to a proposed amendment, and to submit it to the voters. Wells vs. Bain, 75 Pa. 39, asserts that there is another mode, not provided for in the constitution of 1838 (whose provision for amendment is verbatim the same as that of the present constitution), viz. a call by the legislature of a convention to make changes, total or partial, in the constitution, but denies that there is any other way by which a convention can be brought into existence, or that the convention when called, can amend any part of the constitution, or propose a totally new one, unless the legislature has authorized it. Should a convention be called, and should it transcend its legislatively bestowed authority, its act would be void. The power of the people is dependent, then, on the consent of at least one legislature. A legislature may refuse to give them an opportunity to form a convention. What is the solace? This is it, as described by Agnew C. J. in the cited case. "If the legislature possessing these powers of government, be unwilling to pass a law to take the sense of the people, or to delegate to a convention all the powers the people desire to confer upon their delegates, the remedy is still in their own hands; they can elect new representatives that will." They can elect new representatives, but what guaranty is there that they "will"? They may; they probably will. They may not. Meanwhile where is the power of the people at all times to alter, reform or abolish their government, in such manner as they may think proper?

Chief-Justice Agnew, in the case cited, contemplates the possibility that the first, the second, or third, or fourth legislature would refuse to permit the people to form a constitutional convention. What then? "If their representatives are still unfaithful, or the government becomes

tyrannical the right of revolution yet remains." A strange right. Every act in its prosecution, is rebellion, treason, and the perpetrator of it may be put to death or otherwise punished. Yet he has a right to do what he does! He thinks he has a moral right, but he has no legal right; the state against which he revolts, denies that he has a right to do what he does, and all its courts when he is haled before them, will say that he has committed the highest possible crime, treason.

The Constitution of Iowa had a declaration of the rights of the people, at all times to alter or reform the government. In Koehler vs. Hill 60 Iowa 543 Chief-Justice Day holds nugatory an amendment ratified by a majority of 30,000 of the voters, because four words were in the proposal, as considered by the senate of the 18th assembly, that were not in that voted on by the House, and by the senate and house of the 19th assembly. He says that the change of constitution can take place only in the prescribed mode. The supporters of change may, if able, establish it by superior force "If they are powerful enough to succeed, well. They will have altered or reformed the government. But, if they are not powerful enough to succeed, their attempt to overthrow the government is treason, and they are liable to punishment as traitors." To escape this punishment they must destroy the punitory government, yet the courts of that government talk of a right of revolution. From the standpoint of every government, and of every court or other agent of every government, there is no right to change it, except in the prescribed mode, the mode permitted by the government itself. The declaration in Section 2 of Article I of the constitution is untrue, and should have been eliminated as soon as the anarchic doctrines which attended the Revolution, had ceased to be current.

MOOT COURT

WILCOX VS. HEMPHILL

Orphans' Court Sale—When Title Passes—Distinguishing Private Executory Contracts

STATEMENT OF FACTS

X died owning a tract of land on which a tree stood which was old and rotten and threatening to fall. The Administrator of X sold the land under the order of the Orphans Court, made a report of the sale to the court which confirmed it. Hemphill was the purchaser. Before the payment of the purchase price, and the delivery of the deed to Hemphill, the tree fell, prostrating a shop on the neighboring land of Wilcox. He sues for damages.

Stone for the Plaintiff.

Tenenbaum for the Defendant.

OPINION OF THE COURT

Stevens, J. This was an action for damages brought against the purchaser at an Orphans' Court sale by the owner of an adjacent piece of property. Although the sale had been confirmed by the court, the purchase money had not been paid, nor the deed delivered.

The question is whether or not the purchaser had sufficient title to allow an action for damages to be brought against him.

There can be no doubt that in a private executory contract for the sale of real estate that the purchaser obtains an equitable property right in the land and can maintain a suit for specific performance. Furthermore because of this equitable title he becomes liable for any deterioration in the value of the land and is benefited by any increase, between the time of the sale and the conveyance of the perfect legal title. He is considered for many intents and purposes as though he were the owner.

But the courts of this commonwealth have seen fit to draw a distinction between private executory contracts for the sale of land and those sales which are ordered by the Orphans Court, in order to pay the debts of a decedent, saying, "that the reasons which apply to private executory contracts of sale, and which have led to the establishment of the principle that a vendee by article is, in equity, the owner of the land which was the subject of the contract, and as such, must run the hazard of any deterioration in its value, that may take place before the conveyance of the perfect title, do not apply with equal force to Orphans' Court sales for the payment of the debts of a decedent. Such sales are not absolute and unconditional. They depend for their validity upon the approval and confirmation of the court. They are liable to be vacated by a power superior to the purchaser and against his will. The sale even after confirmation does not divest the title of the heirs of the decedent, for it re-

mains in the power of the court, until a deed has been executed and delivered." Demmy's Appeal 43 Pa. 155; Brennan's Estate 220 Pa. 232.

In the case at bar the purchase money had not been paid nor the deed delivered, and therefore the title was not in the defendant.

Mr. Justice Kephart in Morris vs. Fahey, 66 Superior Ct., 81 had arrived at the same conclusion in a very similar case and although the learned counsel for the plaintiff has sought to distinguish them, we fail to find any material or substantial difference. From his findings then, we are not inclined to dissent.

The court is therefore of opinion that the plaintiff must be nonsuited.

NONSUIT.

OPINION OF SUPREME COURT

But little need be added to the opinion of the learned court below. X's heirs became, at his death, the owners of the land. Only they had the right of possession, and we may presume, were in possession. While probably they would, after the administrator's sale, have been liable for waste for any injury to the property, they only, except the plaintiff himself, had the right and therefore they only had the duty, to prevent, by cutting it down, the fall of the tree to the injury of the plaintiff.

Not until delivery of the deed did the defendant become owner of the land, with the right to enter upon it and cut down the tree. Until that time, the Orphan's Court might have withdrawn its confirmation of the sale for reasons given to it. The want of right in the defendant to enter implies the freedom of responsibility for not doing what he had no right to do. The judgment of the learned court is therefore affirmed.

REX vs. COMMISSIONERS OF COUNTY

Bounty Statutes—Submission of Proof—Effect of Repeal of Act

STATEMENT OF FACTS

A statute gave a bounty to such persons as should kill certain noxious animals. While this statute was in operation Rex. killed several animals of this class and became entitled to $10.00 from the County Commissioners.

Before he submitted proofs to them of his acts the statute was repealed and the commissioners therefore refused to pay the bounty.

Coover for the Plaintiff.

Douglas for the Defendant.

OPINION OF THE COURT

Crunkleton, J.—The question in this case is whether an action can be maintained upon proof of acts, submitted after the repeal of the statute providing recovery for those acts.

Since the Plaintiff acted in good faith, and did the acts for which he was entitled, under the statute, to recover a bounty, it

would seem that there was at least a moral obligation on the part of the defendants to compensate Rex for his trouble. But the law is otherwise, is well settled, and is correct on principle, and we are not disposed to disagree with it.

The Plaintiff in this case did not wholly comply with this statute. He performed the act, as provided therein, but failed to submit his proof until after the statute had been repealed. He is not entitled to recover on this partial performance.

If proof of the act was allowed after the statute was repealed, bounties could be recovered after such repeal by the mere statement by witnesses, that the act was done a year or two years ago when such statute was in full effect. The repeal of the act therefore would be futile and the recovery would only be barred by the statute of limitations.

Repeal of a statute conferring jurisdiction on a court takes away all right to hear or determine the cause based on the statute and in the absence of special provisions in the repealing statute, such proceeding must be dismissed. To support this statement the able counsel for the defendant cites—25 R. C. L. 937.

The courts go so far as to hold that where there is an action pending, based on a statute, the repeal of such statute will cause the action to be dismissed. In 57 Pa. 433, it was held that when a statute giving a special remedy is repealed, pending proceedings die with the repeal of the statute. To the same effect is the case of Commonwealth vs. Beattey, I Watts. 382, which holds that where a statute gives a remedy and proceedings are instituted under it, but while proceedings were pending, statute was repealed, there can be no recovery. The remedy was taken away and further proceedings to enforce it were illegal. In 24 Pa. 55, it was held that proceedings commenced under a statute were repealed with the law on which they stood; the attempt to prosecute them subsequently was effete. Again in Norris vs. Crooker, 54 U. S. 429, an action was brought by the plaintiff for the recovery of the penalty provided by the act of Congress, dated February 12, 1793. In September, 1850, another act was passed which repealed the act of 1793 as regards the penalty. The action was brought before the repeal of the act of 1793 but was pending at the time of the passage of the act of 1850. It was held that where such an action was pending at the time of the repeal, such repeal is a bar to the action. These cases differ from the one at bar in that the action was brought while the act was in force but were pending at time of repeal. If such an action was barred by the repeal of the statute, the present action should be dismissed, as there was no statute under which it could be maintained. Where a st. is repealed, it is to be considered as if it never existed and all proceedings founded upon it, which have not ripened into judgment, must fall. Action dismissed.

OPINION OF SUPREME COURT

The statute offered a bounty to such persons as should kill certain described animals. This offer could be accepted by any one, by doing the act solicited. Thus a contract would be made. The plaintiff did the act in reference to the offer. The obligation of the county thus became complete.

No state can impair, by any law, the obligation of a contract. Hence, although the statute offering rewards could be repealed, that is; although the offer of such reward could be withdrawn as to any that had not by action accepted it, the repeal would be void as to such as had accepted it. Such is the view taken by Mintz vs. Scowden, 69 Super. 228, and Steamship Co. vs. Joleffe, 69 U. S. 450.

It follows then, that the right of the plaintiff to the reward, which he had won by his act of killing noxious animals, could not be taken away by a repeal of the legislation. The judgment of the learned court below must therefore be reversed, and judgment entered for the plaintiff.

REVERSED.

PRINCE vs. SHARPLES

Evidence—Delivery of Deed—When Title Passes—Equity

STATEMENT OF FACTS

Prince and Dorn owned undivided halves of a tract of land. Prince agrees to convey his half to Sharples if Dorn would convey his. A deed was made naming both Prince and Dorn as grantors. Prince executed the deed, and alleges (in his bill for the cancellation of the deed) that it was delivered to Sharples on his promise to procure the execution of it by Dorn, and if not, to return it to Prince within one week. Dorn refused to sign it, but Sharples did not return the deed. The defense is parol inadmissable to contradict the import of the delivery of the deed. The evidence would tend to make the deed an escrow, the depository being the grantee himself.

Hennan for the Plaintiff.
Holtzman for the Defendant.

OPINION OF THE COURT

Hand, J.—While this case presents a multitude of questions, they may all be classified under one of the two main issues in this case, namely: 1. Whether or not under the particular set of facts, parol evidence may be admitted to contradict the import of the delivery of the deed, and 2, Whether or not there was a binding delivery of the deed by Prince.

1. As to the admission of parol evidence to contradict a deed, the general rule is, and should be, that such evidence is inadmissable; but just as well settled as the rule itself is the exception in the cases of fraud, accident, or mistake. Where equity would set aside an instrument on these grounds, parol evidence is admitted. This is expressed in 17 P. F. Smith, and has been followed throughout the cases.—200 Pa. 576.

Where, at the execution of a writing, a stipulation has been entered into, a condition annexed, or a promise made by word of mouth, upon the faith of which the writing has been executed, parol evidence is admissable. This rule exactly covers the facts

in the case at bar. Prince executed the deed upon the faith of Sharples' promise to procure the execution by Dorn. This is held in the case cited by the plaintiff, in 85 Pa. 369, and was well explained by Justice Tilghman in 125 Pa. 268, and has been since followed by cases in 173 and 201.

This rule is not only well settled in Pa., but it is amply supported by outside authority. Tiffany, one of the foremost authorities in America on the law of property in land, states: "Relief will frequently be given when the legal nature and effect of the conveyance as written does not correspnd with the agreement of the parties in accordance with which it was made. This will also be found in Pollock on Contracts, and is law in Mississippi, Minnesota and Massachusetts. 23 Iowa 288 goes very much further than it is necessary to go in the case at bar.

2. The second point in the case is as to the delivery of the deed. The delivery was not an escrow, as a delivery in escrow cannot be made to the grantee himself, nor can an escrow be made without the intention of irrevocability. If it were an escrow, the deed would not pass title until the performance of the condition.

Since the deed was not delivered as an escrow, it becomes and absolute delivery, but not so when the instrument is not complete on its face. In the case at the bar, two grantors were named, only one, however, having executed. In 13 Cye 565, it is said: "A delivery is incomplete where made by some of the parties only to a deed, which shows on its face that it was intended to be jointly executed, etc.

The conveyance in question purported to be by two grantors. Only one signed. Ordinarily this signing by Prince would be sufficient to divest him of his property, but in this case delivery was conditioned upon the signature of Dorn. The condition failing, there was no delivery. 31 Miss. 17 9 Rich. (.S C.) 234, 16 Me. 140 33 Am. Dec. 645. See also Tiffany on Real Property, for the proposition that delivery is a matter of intention. See 8 Watts 11.

In 9 Am. and Eng. Enc. Law (2 Ed.), 145-158, it is stated: "A deed in the body of which several grantors are named, but which is signed only by part of them, is ordinarily effectual to convey the interest of those that do sign. (This is the case cited by defendant's counsel in Walker vs. Walker). But if it is in contemplation of the parties that all shall sign before the deed shall take effect, as where the signing by one is inducement for the signing by another, then the deed is not valid unless signed by all." This sums up the law that has been previously stated, and is an uniform rule in the States.

To briefly sum up the case: The plaintiff was only willing to convey his property if Dorn would convey his share thereof. He gave the incompleted deed to the defendant for the purpose of obtaining this signature, in which event, it was agreed that Sharples could keep the deed, after its complete execution. Sharples failed to get Dorn's signature, but none the less fraudulently retained the deed. The parol evidence was admissable. Furthermore there was no valid delivery. The fact that the grantor reserved the right to revoke the conveyance, or to resume con-

trol of the instrument, shows conclusively that there is no delivery, since it negatives the intention that title shall immediately vest in the grantee. Delivery of a deed is a mixed question of law and fact, on which there neither is, nor should be many fixed or arbitrary rules. But some of the elementary rules thereon are well settled, and one is that a deed will not be regarded as delivered while anything remains to be done by the parties proposing to deliver it (4 Whart. 382) as where it is delivered on condition that it shall not become effective until executed by all the grantors, and it is never so executed.

The case of Haviland vs. Haviland, in 105 N. W., 354, is in point, and states the rule that should govern the case at bar. Equity looks to the substance of a transaction, rather than to the form, and the substance here certainly does not show an intentional conveyance of property.

Decree for concellation of deed granted.

OPINION OF SUPREME COURT

A deed does not pass title to the land described in it, until it is delivered.

By delivery is not meant the giving of possession of the deed to the grantee, but the giving of such possession with the simultaneous intention that it shall at once pass the title.

The grantor may hand the deed to the grantee with one of several purposes, e. g., to enable the grantee to see whether its form and phraseology are satisfactory, or as here, to enable him to secure the execution of another grantor, who has not yet signed it.

In this case, the deed was handed to the grantee in order that he should obtain the execution of Dorn, a co-tenant, within a week, and if he failed to obtain Dorn's signature, that he should return the deed to Prince. Proof of this purpose is admissible. Delivery is a matter of act and intention, and must be proved. An act which has some semblance of a delivery, may be shown not to be, in fact, a delivery in the technical sense. A deed does not affirm delivery of itself; evidence of delivery must be outside of it. The case, then, does not present the question of contradicting or modifying a writing by parol, but the question whether the writing took effect in consequence of a delivery. The evidence shows that the deed was put into the posession of Sharples, in order that he should get, within one week, Dorn's signature, with the duty to return it, if Dorn's signature was not procured.

That signature has not been procured. The learned court below has properly required the return of the deed to the plaintiff.

The Appeal is dismissed.

HENRY ADAMS vs. HENDERSON

Estate Tail—Life Estates—Rule in Shelley's Case—Act of 27 April, 1855

STATEMENT OF FACTS

Harris devised his farm to his wife for life, then divided one-half of the farm to be given to his son, Henry, if living at her death, for his life and on his death his share shall pass to his descendants then living as they would have taken had Henry then died seized of the land. Henry claiming a fee has contracted to sell a fee to Henderson who refuses to pay the price agreed on, viz. $4,000.

Schoenly for the Plaintiff.
Sloan for the Defendant.

OPINION OF THE COURT

Schatz, J.—The question for determination in the case at bar is: Did Adams take an estate tail which by the Act of April 27, 1855, has been enlarged to an estate in fee simple or did he take but a life estate. This is merely a question as to whether the Rule in Shelley's Case is or is not applicable.

In Volume I, Rawles' Revision of Bouviers Dictionary the word "Descendants" is defined as: "Those who have issued from an individual including his children, grandchildren and their children to the remotest degree." In the same volume the word "Issue" is defined as: "Descendants" and goes on to say that if the term issue be used in the sense of heirs as comprehending a class to take by inheritance, it is to be interpreted as a term of limitation and brings the case within the Rule in Shelley's Case, which interpretation will prima facie be given to it; but, if the context of the will indicate a different intention "issue" will be sustained as a word of purchase. Stout vs. Good 245 Pa. 383; Beckley vs. Reigert 212 Pa. 91; and 156 Pa. 285. However, that the word issue which is synonomous of descendants, is a word of purchase is held by the weight of authority. In Taylor vs. Taylor 63 Pa. 481, "If it appear either by expression or clear implication that by the word issue, in this case descendants, the testator means issue living at a particular period, it must be construed as a word of purchase and Shelley's Case would not apply. In Robins vs. Quinlin 79 Pa. 333 "If there be on the face of the will, sufficient to show that the word was intended to be applied only to descendants of a particular class at a particular time, it is to be construed as a a word of purchase. In Jones vs. Jones 201 Pa. 548 it is held that when a testator annexes words of explanation to "heirs" or "heirs of his body" such as "then living" using terms as a mere description personarum, or for specific description of individuals, a new inheritance is engrafted upon the heirs to whom the estate is given and they will be assumed to take as purchasers. McCann vs. McCann 197 Pa. 452; Hill vs. Giles 201 Pa. 215; Findlay vs. Riddle 3 Binney 139.

Whether the intention of the testator in the case at bar was to limit the descendants to those living at a particular period is made clear by the words "then living." But the words then liv-

ing and words similar to them will not, in and of themselves be sufficient to reduce a word of limitation to a word of purchase 166 Pa. 445, but when a word such as descendant which is not a technical word of limitation, is used, the burden of proof is on him who claims such words to be the equivalent of "heirs" or "heirs of his body" to demonstrate that intention. But if the intention of the testator is repugnant to the Rule in Shelley's Case, the intention will not be considered for the Rule is an absolute one and not constructive.

When superadded words of limitation are joined with a special direction for distribution it is conclusive evidence of an intent that the remainderman shall take as a purchaser. Stout vs. Good 245 Pa. 383.

The able counsel for the defedant errs when he says the courts have not adjudicated a case like the case at bar. Lee vs. Sanson 245 Pa. 392 is a case in point. The testator gave the residue of his estate to his wife for life and directed that at her death the property should be divided into shares. He then devised to his son, Charles, a life estate in his share if he shall then be living. Upon his decease his share of said realty shall pass to his descendants, then living, who shall take in such proportions with like force and effect as they would have taken had he died actually seized and possessed thereof. The court held that only a life estate was created.

In view of the law above stated the court holds that the estate which Henry Adams received was an estate for life and the Rule in Shelley's Case does not apply.

That Henderson does not have to pay the price agreed on is the decision of the Court and judgment must be entered for the defendant.

OPINION OF SUPREME COURT

Can the plaintiff convey a good title in fee to the defendant?

The learned court below properly concludes that the applicability or non-applicability of the rule in Shelley's case must decide.

The testator gives the land to Henry, if living at the death of his mother, "for his life." On his death, his share shall pass to his descendants then living. The time for "passing" is Henry's death, and to whom should it pass but to persons "then living?" And if these persons are descendants, to whom but descendants then living, could it pass? Nevertheless, since these words are taken to restrict the descendants, as they must, that fact is held to prevent the inference that the land is to pass by inheritance, and to require the inference that it is to pass directly from the testator.

The learned court below has prudently followed Lee vs. Sanson, 245 Pa. 392, in holding that Henry has only a life estate, and that the gift to his descendants is strictly a gift to them and not to Henry.

The judgment is affirmed.

PENROSE, RECEIVER vs. HAMMOND

Suit by Receiver—Set-off—Executors and Trustees

STATEMENT OF FACTS

Suit on a note of Hammond's for $1500. He seeks to set off a debt of the bank, to himself as administrator of Y for $500, and another to himself as trustee of Z for $750. The court has refused to permit the set-off.

OPINION OF THE COURT

Doyle, J.—The question presented in the case at bar is: May the Defendant, Hammond, who is being sued in his own right by Penrose, the receiver of an insolvent bank, use as a set-off against his own note, debts owed to him by the bank, as administrator and trustees of other persons.

As stated by the able attorney for the plaintiff, "The foundation of Set-off is the prevention of circuity of actions; and cross demands must be held in the same persons and in the same rights so that actions may be maintained thereon each against the other."

Although the defendant contends that the granting of the set-off in this case would prevent circuity of actions, it is not evident from the facts how this could be true.

In the present case, the action is against the Defendant for his own personal debt, and the demand which he endeavors to set-off is not his own, but one in which the only right he has is as a representative of others. So if the requested set-off were permitted, new causes of action would arise in the persons for whom Hammond is acting as representative, and instead of preventing, such a ruling would increase circuity of actions.

Hunter vs. Henning, 259 Pa. 347, a case cited by the attorney for the plaintiff is directly on point. In this case it was held that an executor or trustee cannot set-off debts owed to him as a representative, in an action brought against himself by a receiver of an insolvent bank, for his own personal debts. The court gave as a reason for so holding that such a set-off could not be allowed because of lack of mutuality in quality of right with respect to the counter claims.

As this ruling prevents an executor or trustee from misappropriating funds entrusted to him for others, to his own use, we feel that it is just, and that the case at bar should be decided accordingly.

The judgment of the lower court is therefore affirmed and the requested set-off is not permitted.

OPINION OF SUPREME COURT

Hammond, as administrator of Y, deposited $500, and as trustee for Z, deposited $750 in the bank of which Penrose is receiver. He could have withdrawn these deposits at any time, and could have sued the bank if it refused to repay them. 2 P. & L. Dig. Decisions, col. 2075. Cross-Reference Annual, Col. 587. In one of the cases cited an "assignee," who in that name had made

a deposit, was allowed to pay with it, his individual debt to the bank. Lanbach vs. Leibert, 87 Pa. 55.

It would be an advantage to the estates for which Hammond was a fiduciary, if he could have used the bank's claim against him for them. The justice who writes the opinion in Hunter vs. Henning, 259 Pa. 347, remarks: "The manifest effect of such a set-off would be to enable the debtor to pay a debt of his own with money belonging to other people." p. 354. But, another result would be that he would use the fund of the bank (his debt to it) in partial payment of its debt to the cestuis que trust.

The only tangible objection to this result is, that it might give a preference in payment by an insolvent bank, to two of its creditors; or to the common trustee of them.

This may seem a deplorable result. It may be sufficient to justify the doctrine that Hammond must pay his debt to the receiver, rather than retain it for application to the funds of which he is trustee and executor.

The judgment of the learned court below is AFFIRMED.

HARRIMAN vs. SAUNDERS

Verbal Contracts—Statute of Frauds—Sales

STATEMENT OF FACTS

On the premises of Saunders, X was making additions and repairs. X was to receive $1000, furnishing all the material and labor. Saunders deposited $1000 with M, from which payments were to be made from M to X on Saunder's order. X applied to Harriman for the sale of $200 worth of lumber. Doubting X's solvency, Harriman saw Saunders, who told him that he had deposited the One Thousand Dollars with M, and that on his getting an order from X on M, he would be paid the price of the lumber.

Harriman then furnished the lumber but M declined to pay the $200 on X's order because he had already paid out the whole of the One Thousand Dollars deposited with him.

Shahadi for the Plaintiff.

Surran for the Defendant.

OPINION OF THE COURT

Yost, J.—The action brought by the plaintiff is assumpsit for money amounting to $200 said to be owing to him by the defendant by reason of the sale of lumber to X, a contractor working for the defendant. The contention of the plaintiff is that the defendant contracted to pay the plaintiff for the lumber, i. e., that the defendant imposed upon himself a primary obligation to pay the debt, to which or compared to which, X's obligation to pay was merely secondary and incidental. In support of which above stated contentions, he cites 13 Pa. Superior Ct. 77, 174 Pa. 602, 111 Pa. 471, 190 Pa. 263.

The defense set up is the statute of frauds. The defendant contending that the statements made by him in no way made him responsible for the payment of the money now claimed due to the plaintiff. He cites, in support of his claim Nugent vs. Wolfe

(also cited by plaintiff, see above) 111 Pa. 471, 66 Pa. Superior Ct. 238, 68 Sup. 415.

The case of Nugent vs. Wolfe 111 Pa. 471, cited by both counsels is irrelevant to the issue in this case and does not in any way resemble the facts of the case at bar.

The question to be decided here is based on whether or not the statute of frauds now in force in Pa. is applicable here.

We are of the opinion that this case does come within the statute of frauds and perjuries enacted and passed in Pa. in 1855. Were it true, that as the plaintiff contends, the words used by the defendant created a primary obligation to pay the debt, then certainly this action would stand.

The defendant merely directed the plaintiff as to the manner in which he would best be assured payment for the materials furnished by him. I do not think he did any more. Be that as it may, it does not enter into the case, as it is sufficient that at the very most, the defendant's words created no more than a promise to pay and therefore must be in writing in order to sustain an action. As there is no writing or memorandum in the evidence submitted, we are compelled to decide the case in favor of the defendant.

X is in no way released from his liability but it is unavoidable that hardship be worked here. If the plaintiff is unable to collect from X, by reason of insolvency or his being execution—proof it is one of the hardships arising by reason of the necessity for such a statute as the one governing this case. The statute is largely necessary by reason of the fact that parties interested in an action or suit are now competent witnesses, and as everyone is presumed to know the law, we must presume that the plaintiff was aware of the necessity of a written instrument to secure himself from loss in this case.

In support of the decision we cite 68 Pa. Superior 415, Riley vs. Kahan, a case exactly on point, also 66 Pa. Superior Ct. 211, two recent cases and the authorities cited therein and render judgment for the defendant.

Judgment for Defendant.

OPINION OF THE SUPREME COURT

Saunders is sued for $200. for lumber furnished by Harriman. Did Saunders agree to pay for it? We think he did. He told Harriman that, if he obtained from X, the builder, an order on M, with whom he, Harriman, had deposited $1000, "he would be paid the price of the lumber."

Was this promise one to pay the debt of another? We do not see that it was. As to any other person than Saunders, the debt was that of X. Was it X's debt? When X applied to Harriman for the lumber, the latter, doubting his solvency, saw Saunders, and, so far as appears, determined to let X have the lumber on Saunder's undertaking. The lumber was to go into Saunder's house. We do not see that any debt for it on the part of X arose. The sale seems to have been for Saunders's house, and on his promise. As it does not appear, then, that X became a debtor for the lumber; that the lumber was sold to him, we cannot say that there was a debt of X, the primary debt, and that Saunder's debt was secondary. There was no promise to pay the debt of another.

But even if X became a debtor, and the primary debtor, we think Saunder's promise not within the statute of frauds. He was owner of the house. He was making repairs. In engaging the lumber to be at the service of X, he was promoting his own scheme of improvement. If Harriman had furnished the lumber to X, the price of it might have been made a lien on the house. Providing for payment was a means of averting such a lien. See Arnold vs. Stedman, 45 Pa. 186, and cases in 20 P. & L. Digest, columns 34, 880, 34881. The defendant's promise was made to secure lumber in order that it might be incorporated into his house.

In Peter vs. Kahan, 68 Super. 415, the court finds that the promise was that another should fulfill his contract. We are not able to find that X became purchaser of the lumber, and promised to pay for it.

We must therefore announce a different result from that reached by the learned court below.

Reversed, with a v. f. d. n.

REED vs. JOHN HOLDEN AND WIFE, SARAH

Assault—Liability of Husband for Wife's Torts

STATEMENT OF FACTS

An action was brought against the husband and wife to recover damages alleged to have resulted from the assault by the wife. The case was tried before a jury and resulted in a verdict against both defendants and judgment was entered.

OPINION OF THE COURT

Werner, J.—The question to be decided is whether a husband can be joined in a suit for assault when he was in no way connected with it. His liability, if any there be, rests wholly upon the fact that he was the husband of the woman whose assault inflicted the wrong complained of.

At common law the husband was liable to respond in damages for torts of his wife whether present or not. The act of 1848 still recognized many limitations, the later Acts of 1887 and 1893 have practically and almost completely emancipated the married woman save in so far as it was thought to be for her benefit to restrain her separate action in regard to her property in the very few instances named.

Section two of the Act of 1887, June third, provides that a married woman shall be capable of entering into and rendering herself liable upon any contract relating to trade, etc., and of suing and being sued either upon such contract or torts done to or committed by her as though she were a feme sole. The act also states that the husband need not be joined with her as either plaintiff or defendant, or be made a party to any action of any kind brought by or against her in her individual right. The act of June 8th, 1893, P. L. 344, provides that hereafter a married woman may sue and be sued civilly in all respects and in any form of action with the same effect and results and consequences

as an unmarried person. This only goes to show that since a married woman has been given the full use of her own property she should like other adults human beings be responsible for her own voluntary misconduct.

In Gustine vs. Westenberger 224 Pa. 455, it was held that under the act of 1893 the wife and not her husband was liable in damages for her torts. In this case it was unnecssary and improper to join the husband as a defendant.

In the case then is no assignment of error that would warrant a reversal of the judgment of Sarah Holden, the actual tort feasor.

It is therefore considered that the judgment as against Mrs. Sarah Holden be affirmed while as against Mr. Holden it be reversed.

OPINION OF SUPREME COURT

At common law, the husband was liable for torts of the wife. He continues to be liable unless that law has been modified by legislation. Two acts of assembly have been passed, which are assumed by the courts to have taken away the husband's liability, i. e., the act of June 3rd, 1887, and that of June 8th, 1893. Although they do not expressly say that the husband shall not be liable, they are construed to abolish his liability. "Under the act of 1893," says Brown, J, "she (the wife) and not her husband, is liable in damages for her torts." Gustine vs. Westenberger, 224 Pa. 455. This was cited in Smith vs. McChesney, 238 Pa. 538, as holding that the husband's liability for the wife's torts had been abolished. The Superior Court takes the same view of the question in Hinski vs. Stein, 68 Super. 441, where a joint judgment against Stein and wife, for a slander committed by the wife, was affirmed as to the wife, but reversed as to Stein.

It follows, then, that the judgment of the learned court below, supported by its succinct and clear opinion, must be AFFIRMED.

BOOK REVIEWS

Commercial Law Cases

By Harold L. Perrin and Hugh W. Bobb. New York: George H. Doran Co., 1921. 2 vols, pp. XXI, 536, XV, 414.

Mr. Perrin is the head of the department of law of the College of Business Administration, and the College of Secretarial Science, Boston University and Mr. Bobb is an assistant professor of law in the same department. They state that the object of the book is to furnish material adequate for a two years' course in commercial law in colleges, and constitute an attempt to combine the advantages of the text book and case systems and to eliminate some of the disadvantages of each. The method pursued to attain this end is to preface the cases collected under each sub-division with a short statement of the general principles applied by the courts in the cases that follow. The subjects covered are: Contracts, Sales, Agency, Negotiable Instruments, Partnership and Corporations. To cover so much ground in two volumes the authors have made their own statements of the facts involved in the cases and the student thus avoids the task of eliminating non-essential facts. Only excerpts from opinions are printed and these are restricted to the single point which it is intended to impress upon the student. The authors admit they have been forced to take many liberties with the reported cases to render judgments so truncated more readable and to aid concentration.

The theory of the authors is that the study of cases is valuable by way of illustration of the application of the principles stated in the text matter rather than as a method of developing the student's power of analysis and his ability to state accurately in his own language the legal principle which controlled the decision of the case. All case books used in law schools omit the syllabus printed in the reports but the authors of these volumes have not hesitated to print the doctrine of each case immediately after their statement of the facts and before the excerpt from the opinion.

On page 381 of the recent bulletin published by the Carnegie Foundation for the Advancement of Teaching, entitled: "Training for the Public Profession of the Law," it is said: "Schools that utilize cases to illustrate or develop legal principles previously presented in predigested form, rarely describe themselves for what they are—schools that vitalize the otherwise dead body of text book information by excellent supplementary features, but schools which none the less move on a secondary plane where students acquire fundamental principles at second hand rather than through their own efforts."

The authors of this book have attempted to give such an extent of knowledge that it was, of course, necessary for them to sacrifice mental discipline and thoroughness. The fact remains that it is a hollow pretense to say that one who uses this book in his classes is applying the case method of teaching law.

On the other hand an examination of the cases used will disclose the fact that the authors have on the whole made selection of those cases which are familiar to the students of the case

books compiled for use in law schools. A careful study of these volumes will give the student a large amount of legal information and an understanding of the reasons underlying many of the rules of law he learns. The authors have performed a valuable service in preparing a book which is calculated to produce much better results than a mere text book and it must be admitted that it would not be practicable to cover in the time allowed more than a small fraction of the subjects included in these volumns, if the use of the real case system were attempted.

Handbook on the Law of Persons and Domestic Relations by Walter C. Tiffany. Third Edition by Roger W. Cooley, LL.M. West Publishing Company,, St. Paul, Minn., 1921.

This book has been in use in Law Schools and by lawyers, for a good many years. Covering more than 750 pages, it first contains chapters on marriage; rights and duties incident to coverture: effect of coverture on rights of property, the wife's statutory separate estate, antenuptial and post nuptial settlements, separation and divorce. Part II deals with Parent and Child, and treats, in separate chapters of legitimacy and adoption, duties of parents and rights of parents and of children. The third part treats of guardians, their appointment, rights and duties, and the termination of guardianship. Part III discusses infants, persons non compotes mentis and aliens. The last part treats of Master and Servant. The editor's work, displayed for the most part, in the notes, has been well done. The book is to be commended for its succinctness and for the excellence of its classifications. Like all the hand books of the West Publishing Company, it may be safely recommended to the attention of students of the branches of the law with which it professes to deal.